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In the Supreme Court of the United States

OCTOBER TERM, 1945

CHAMPLIN REFINING COMPANY, APPELLANT

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF OKLAHOMA

BRIEF FOR THE UNITED STATES AND THE INTERSTATE COMMERCE COMMISSION

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In the Supreme Court of the United States

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ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF OKLAHOMA

BRIEF FOR THE UNITED STATES AND THE INTERSTATE COMMERCE COMMISSION

OPINION BELOW

The opinion of the specially constituted district court (R. 79) is reported in 59 F. Supp. 978. The report of the Interstate Commerce Commission (R. 57) is published in 49 Val. Rep. 542, the earlier report of Division 2 of the Commission (R. 47) appearing in 49 Val. Rep. 463.

JURISDICTION

The final decree of the three-judge district court was entered on April 16, 1945 (R. 113). Petition for appeal was presented and allowed on

April 16, 1945 (R. 114). The jurisdiction of this Court is invoked under Section 210 of the Judicial Code, 36 Stat. 1150, as amended by the Urgent Deficiencies Act of October 22, 1913, 38 Stat. 208, 220 (28 U. S. C. 47a), and Section 238 of the Judicial Code, as amended by the Act of February 13, 1925, 43 Stat. 938 (28 U. S. C. 345). Probable jurisdiction was noted by this Court on June 18, 1945 (R. 965).

QUESTION PRESENTED

Whether the Interstate Commerce Commission's finding that appellant is a "common carrier" within the meaning of Section 1 (1) (b) and 1 (3) (a) of the Interstate Commerce Act, as amended, and its consequent order to appellant to furnish certain information and data required under Section 19a of the Act, were within the Commission's statutory and constitutional powers.

STATUTE INVOLVED

The pertinent provisions of the Interstate Commerce Act, as amended, are set out in the Appendix, *infra*, pp. 34–39.

STATEMENT

The Interstate Commerce Commission, pursuant to its statutory duty "to investigate, ascertain, and report the value of all the property owned or used by every common carrier subject to the provisions" of part I of the Interstate Commerce Act, on December 31, 1934, issued its

"Valuation Order No. 26—Revised" (R. 486), and on April 12, 1935, issued its "Valuation Order No. 27" (R. 509), requiring all pipe-line companies subject to the Act to furnish certain maps, charts, schedules, and inventories. Copies of Valuation Orders Nos. 26 and 27 were served on appellant on May 15, 1941 (R. 44–45). In lieu of compliance, appellant filed a petition with the Commission alleging that it was not a common carrier subject to the provisions of the Interstate Commerce Act and praying that the Commission so determine (R. 157). In due course, after full hearing, the proceeding instituted by appellant's petition resulted in the issuance of the Commission's report[1] and order of June 12, 1944 (R. 57, 67), wherein the Commission found appellant to be a common carrier of refined petroleum products by pipe line and subject to the Act, and required appellant to comply with Valuation Orders Nos. 26 and 27 (R. 486, 509). Appellant's petition for reconsideration was denied on July 26, 1944 (R. 67). On August 10, 1944, appellant filed suit in the United States District Court for the Western District of Oklahoma to set aside the Commission's order (R. 1). The United States and the Commission filed answers (R. 69, 73), and the cause came on for hearing on October 12, 1944 (R. 78, 121). On March 21,

[1] In this report the full Commission, after reargument, affirmed the findings made by Division 2 of the Commission in its report of December 14, 1942 (R. 47).

1945, the court rendered its opinion (one judge dissenting) wherein it upheld the validity of the Commission's order (R. 79). After denying, on April 13, 1945, appellant's petition for rehearing (R. 100), the court, on April 16, 1945, made its findings of fact and conclusions of law (R. 107) and entered its final decree (R. 113) dismissing appellant's suit. Petition for appeal was presented and allowed on April 16, 1945 (R. 114). On June 18, 1945, this Court noted probable jurisdiction (R. 965).

The material, substantially undisputed facts,[2] upon which the Commission's order is based (see R. 47–57, 57–66), are as follows:

Appellant, whose corporate charter authorizes it to transport petroleum (R. 427), owns and operates a pipe line extending from appellant's refinery at Enid, Oklahoma, to Rock Rapids, Iowa, with terminals at Hutchinson, Kansas; Superior, Nebraska; and Rock Rapids, Iowa (R. 166, 191). Construction of the line from Enid to Superior was completed in June 1935 (R. 133); the portion from Superior to Rock Rapids

[2] Although appellant does contend that there is no evidence to support the order of the Commission (R. 958), it is believed that this attack is primarily directed at the legal sufficiency of the facts found to support the order made, and that there is no substantial dispute with regard to the sufficiency of the evidence of record to support the findings made by the Commission in its reports (R. 47–57, 57–66). That those findings are abundantly supported by substantial evidence will readily appear upon examination of the record references cited in the statement which follows.

was completed in May 1940 (R. 169, 191). Besides operating this pipe line, appellant is engaged in the refining, distribution, and sale of petroleum products in interstate commerce as an integrated oil company (R. 167). Appellant's products, manufactured at the Enid refinery, are produced for sale, and are sold and delivered, to the general public in many States (R. 206, 245).

Appellant's pipe line is known as a "products" pipe line, which is used for transportation of refined petroleum products only (R. 165). The pipe line is so constructed that it has no connection with any other pipe line (R. 194, 211); there is no point at which any petroleum products can be put into the line other than at the Enid refinery (R. 194); there is no point other than the three terminal points where products can be taken from the pipe line (R. 192); delivery of the products at the three terminal points is made from the storage tanks at the terminals by means of truck racks or railroad tank car racks and is not made directly from the pipe line in any instance (R. 194–5); no tariffs have been filed with the Interstate Commerce Commission or with any state commission or regulatory body (R. 52); appellant is the sole owner of the products transported through its pipe line (R. 194, 203, 249), and has never transported any products the title to which was in any other company (R. 194, 249).

Appellant's pipe line is not used as a "crude oil" pipe line to bring crude oil to appellant's re-

finery from the wells (R. 165, 190). For the purpose of supplying the crude oil requirements of the Enid refinery, appellant employs the line of a wholly owned subsidiary corporation, the Cimarron Valley Pipe Line Company, which is admittedly a common carrier, operating within the State of Oklahoma (R. 165, 190). Construction of the "products" pipe line involved in this case was originally undertaken by the subsidiary corporation (R. 195, 198–199). It filed declarations with the Kansas Public Utilities Commission that it was a common carrier, and a permit was issued describing it as such (R. 264–B, 267–8, 431). It also instituted a number of eminent domain proceedings in Kansas (R. 200, 273–5). Subsequently, upon the completion of the line between Enid, Oklahoma, and Superior, Nebraska, in June 1935 (R. 169), the subsidiary corporation withdrew all of the eminent domain proceedings except two, one of which the court, on July 5, 1935, dismissed for lack of jurisdiction (R. 278) and the other of which had been dismissed on April 1, 1935, because brought by an agent not authorized to practice in the court (R. 279). Settlements were made with the defendants in all the suits for the use of the lands involved. Appellant, on June 10, 1935, took title from its subsidiary to the above-described portion of the pipe line (R. 280–A) and began to use it for the transportation of its petroleum products (R. 177). On July 2, 1936, the Cimarron withdrew from the

State of Kansas and in 1941 the Kansas Corporation Commission by formal order "figuratively" struck the Cimarron's "certificate of convenience and authority" from its files and records (R. 433–434).

The portion of the pipe line between Superior, Nebraska, and Rock Rapids, Iowa, was constructed under a permit, applied for in 1939 by appellant in its own name and issued by the Iowa State Commerce Commission, to construct and operate a pipe line for the transportation of petroleum products "under, along, over or across any public and/or private highways, grounds, waters or streams of any kind * * * or the lands of any person, company, or corporation," in Iowa (R. 480–A). The permit contained express authority to exercise the right of eminent domain (R. 482). In 1941, after the entire line had been completed, appellant notified the Iowa Commission of its desire to disclaim common carrier status and requested issuance of a new permit (R. 483). The new permit, however, still contained provisions authorizing the company to use the property of others (R. 485).

Appellant uses the pipe line for the transportation of petroleum products which are sold by it in "spot-market" and "contract" sales (R. 216–17, 226). In both of these types of transactions, the purchaser of products which have been transported through the pipe line pays a price which is determined by adding to the refinery price

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at Enid, which is separately specified, an amount designated as a "differential" (R. 212, 215, 254, 262): This "differential" is an amount equal to the through rail rate from Enid to purchaser's destination, minus the charges paid out by the purchaser for short-haul transportation from appellant's pipe-line terminal to destination (R. 253–55). Other oil companies employ the same method of pricing their products (R. 219, 259), and occasional departures from the formula are made by appellant when necessary to meet competition (R. 213, 220, 253, 258). The refined petroleum products sold to purchasers at various destinations after transportation by the pipe line are the same products for which the separately specified Enid price is fixed, and are not further processed in any manner after leaving the refinery at Enid (R. 191, 207, 210).

SUMMARY OF ARGUMENT.

I

The words of Section 1 (1) and (3), its legislative history, and the authoritative construction put upon these provisions by this Court make it abundantly clear that appellant, being a pipe-line company "engaged in the transportation of oil or other commodity," is a common carrier within the meaning of the Interstate Commerce Act, as amended, and, even if not a common carrier in the common-law sense, may be required to furnish the information sought by the order here

entered pursuant to Section 19a. Appellant's pipe line, used in transporting petroleum products from its refinery to storage tanks from which the products are distributed to appellant's customers, is not employed merely as an incident to manufacture but as a part of the sale and distribution facilities through which appellant's petroleum products are marketed in interstate commerce. That appellant makes a distinct charge for transportation by way of the pipe line is striking evidence that, in substance, it is serving the public just as much as if title to the petroleum vested in the purchaser before passage through the pipe line. Appellant's transportation of petroleum products to market is no less subject to regulation than the transportation of crude oil to a refinery in *Valvoline Oil Co.* v. *United States*, 308 U. S. 141, where the oil in transit, the pipe line, and the terminal refinery were all owned by one company. Moreover, appellant, having enjoyed some of the privileges of a common carrier in the common law sense, cannot properly complain if corresponding obligations are placed upon it.

II

Appellant has been ordered only to supply certain maps, charts, schedules, and inventories to the Commission. The Commission's constitutional power to make such an order has been ex-

pressly upheld by this Court in the *Valvoline* case. In that decision, this Court ruled that a carrier could not raise constitutional objections based on statutory provisions other than those under which the information is ordered to be produced. That limitation is applicable here as well. In any event, the appellant's constitutional rights were not infringed, particularly since its pipe line was constructed long after enactment of the statute. *The Pipe Line Cases,* 234 U. S. 548, 541.

ARGUMENT

I

THE COMMISSION HAD STATUTORY POWER TO MAKE THE ORDER

Section 19a of the Interstate Commerce Act requires and empowers the Commission to "investigate, ascertain, and report the value of all the property owned or used by every common carrier subject to the provisions of" Part I of the Act, and requires and directs "every common carrier * * * to cooperate with and aid the Commission in the work of the valuation of its property in such further particulars and to such extent as the Commission may require and direct." Consequently, the order of June 12, 1944, assailed in the case at bar, is obviously warranted under the terms of Section 19a if appellant is a "common carrier" within the meaning of the Act. It is submitted that appellant is such a common carrier.

A. *Appellant is a "common carrier" within the meaning of the Interstate Commerce Act, as amended.*—The statutory definition of a "common carrier" within the meaning of Part I of the Act is found in the following language of Section 1:

> SEC. 1. (1) That the provisions of this part shall apply to common carriers engaged in—
>
> * * * * *
>
> (b) The transportation of oil or other commodity, except water and except natural or artificial gas, by pipe line, or partly by pipe line and partly by railroad or by water;
>
> * * * * *
>
> (3) (a) The term "common carrier" as used in this part shall include all pipe-line companies; express companies; sleeping-car companies; and all persons, natural or artificial, engaged in such transportation as aforesaid as common carriers for hire.

The effect of this statutory language is to make the valuation provisions of the Act applicable to "all pipe-line companies" which are "engaged in the transportation of oil or other commodity, except water and except natural or artificial gas, by pipe line." Appellant clearly is included within the meaning of the words used. While it is true that the statute speaks of "common carriers" engaged in the transportation of certain commodities by pipe line, the statute also explains what that term means by supplying its own definition of

the expression "common carrier." Cf. *Cornell Steamboat Company* v. *United States*, 321 U. S. 634, 637.

Appellant's extended argument (Br. 30–40) designed to show that this construction of the statute is incorrect and that the Act applies only to "common carriers' in fact" (Br. 30) requires little consideration, for this Court, in *Valvoline Oil Co.* v. *United States*, 308 U. S. 141, specifically rejected such a view (308 U. S. at 144, 145–146):

> Section 1 (3) defines common carrier to include "all pipe-line companies." If this definition is not limited by the subsequent clause "engaged * * * as common carriers for hire," extended consideration of these characteristics of a private carrier is unnecessary as the language of the definition is decisive.
>
> * * * * * *
>
> As now written the section brings railroads under the Act by means of the last clause of subsection (3) only. This clause is a conjunctive, not a modifier. It does not affect the generality of the first clause as to pipe-line companies.

Thus the statute, as construed in the *Valvoline* case, applies to (1) all pipe-line companies, (2) express companies, (3) sleeping-car companies, *and* (4) all persons, natural or artificial, engaged as common carriers for hire in such transportation (*e. g.*, by railroad) as is described in Section 1 (1) and Section 1 (2). Whether or not they are

common carriers *for hire,* pipe-line companies, express companies, and sleeping-car companies are covered; those engaged in other callings are within the Act only if they are common carriers for hire. It was with this distinction in mind that this Court in the *Valvoline* case (308 U. S. at 146) put aside as irrelevant the decision of this Court in *Pennsylvania R. Co.* v. *Public Utilities Commission,* 298 U. S. 170, which, with other similar cases, is much relied upon by appellant here (Br. 18–21).

The *Valvoline* case likewise establishes that the present statutory language has the same meaning as the original provision of the Hepburn Act of June 29, 1906, 34 Stat. 584, which was construed in *The Pipe Line Cases,* 234 U. S. 548, 559. As originally enacted, the provision subjecting pipe lines to the Act read as follows:

> That the provisions of this Act shall apply to any corporation or any person or persons engaged in the transportation of oil or other commodity, except water and except natural or artificial gas, by means of pipe lines, or partly by pipe lines and partly by railroad, or partly by pipe lines and partly by water, *who shall be considered and held to be common carriers within the meaning and purpose of this Act,* and to any common carrier or carriers engaged in the transportation of passengers or property wholly by railroad * * *.
>
> The term "common carrier" as used in this Act shall include express companies

and sleeping car companies. [Hepburn Act of June 29, 1906, 34 Stat. 584; italics supplied.]

The language of the Hepburn Act was construed in *The Pipe Line Cases*, 234 U. S. 548, 559–60, as follows:

> The provisions of the act are to apply to any person engaged in the transportation of oil by means of pipe lines. The words "who shall be considered and held to be common carriers within the meaning and purpose of this act" obviously are not intended to cut down the generality of the previous declaration to the meaning that only those shall be held common carriers within the act who were common carriers in a technical sense, but an injunction that those in control of pipe lines and engaged in the transportation of oil shall be dealt with as such.[3]

It will be noticed that the provisions of the Interstate Commerce Act as amended by the Hepburn Act and construed in *The Pipe Line Cases*, applied to "any corporation or any person or persons" engaged in the transportation of oil or

[3] The ambiguity necessitating this judicial interpretation of the words of the Act was due to the fact that the House conferees, at the second conference, insisted upon accepting the original Senate amendment containing this wording. The Senate conferees were thus powerless to prevent the adoption of this version, although at the first conference they had agreed to a change making the meaning clear. 40 Cong. Rec. 9101–9102.

other commodity (except water and natural or artificial gas) by means of pipe lines. The law at that time did not contain the expression "pipe-line companies." Those words first appeared in the language adopted in 1920. But the meaning of the Act remained unchanged, and appellant cannot escape from the clear terms of the earlier version by reason of any ambiguity with respect to the meaning of the term "pipe-line companies." However, no ambiguity exists. Appellant, owning and operating an interstate pipe line, is undoubtedly a pipe-line company.[4] This is obvious from the plain meaning of the language used, even apart from the authoritative determination in the *Valvoline* case to the effect that the present statute has the same meaning as the earlier version, and, in *The Pipe Line Cases*, to the effect that the earlier version included any person engaged in transportation by means of pipe lines.

Appellant's contention (Br. 32–36) that it is not a pipe-line company because it is also engaged in the refining business is untenable. The same view could as well have been taken in the *Valvoline* case (R. 944–945) and with respect to some other oil companies in *The Pipe Line Cases* (R. 907) but was rejected on both occasions.

[4] In the *Valvoline* case, the Court found it necessary to do no more than summarily state that "There is no controversy over whether appellant is an interstate pipe line company. Obviously it is." 308 U. S. 141, 144.

The legislative history of the Hepburn Act supports the judicial construction put upon it, and leaves no doubt that appellant's view that the statute applies only to those engaged in transportation "for others" (Br. 9–30) is an erroneous one.[5] Cf. *United States* v. *Simpson*, 252 U. S. 465, 466–467. The provision relating to pipe lines was offered as an amendment by Senator Lodge of Massachusetts on May 4, 1906 (40 Cong. Rec. 6361). Senator Foraker, of Ohio, thereupon stated (40 Cong. Rec. 6361):

> I do not want to make any opposition to the Senator's amendment, but it occurs to me that the amendment ought to be further amended, so as to provide that it shall apply only to pipe lines operated for the public. I do not understand how you would compel a man who has a private pipe line of his own to become a common carrier. * * * I think such a limitation ought to be put in the Senator's amendment by an amendment to the amendment that it shall apply to all pipe lines that are carrying for the public, and not to private pipe lines that an individual or a single corporation may have laid down and put into operation for its own benefit.

[5] In the Commission's report in the proceeding out of which *The Pipe Line Cases* arose, *In the Matter of Pipe Lines*, 24 I. C. C. 1, 4–6, there is a good discussion of the legislative history, to which the Commerce Court also referred. See *Prairie Oil & Gas Co.* v. *United States*, 204 Fed. 798, 806.

To this Senator Nelson of Minnesota replied that (40 Cong. Rec. 6365):

> if that amendment is adopted it will practically nullify the provision, because every one of these pipe lines can say "we refuse to do business for the public."

Senator Lodge emphasized that (40 Cong. Rec. 6365):

> the amendment suggested by the Senator from Ohio to my amendment, to the effect that no pipe line, unless it carries for the public, shall come under this rule, will, as the Senator from Minnesota [Mr. Nelson] says, absolutely destroy the value of my amendment.

After the Lodge amendment had been agreed to in Committee of the Whole (40 Cong. Rec. 6373), it was debated in the Senate (40 Cong. Rec. 6953, *et seq.*) and Senator Foraker again urged the insertion of "for the public," "for hire," "for compensation," or other similar terms. 40 Cong. Rec. 6999–7000. Senator Lodge vigorously opposed such modification of the wording, and declared that such a limitation would absolutely destroy the effectiveness of the proposed legislation. He said (40 Cong Rec. 7000):

> If you put in the words "transportation for hire" or "transportation for the public" you absolutely destroy this amendment so far as its effectiveness is concerned. The method of getting the oil is,

> as a rule, that the Standard Oil Company or the Pure Oil Company, which are the two great carriers of oil, buy it of the well owner and carry it, and they would immediately say they were not carrying for the public; that they were carrying for themselves. That is the reason why the word "public" or "transportation for hire" put in there would immediately wreck this amendment. * * * if you put in the words "for the public," after "transportation," you practically kill the amendment.[8]

Again, during debate on the second conference report, Senator Foraker pointed out that the provision which had been adopted by the Senate made all pipe lines common carriers (40 Cong. Rec. 9107), and referred to his repeated efforts to obtain amendments, which the Senate had refused to adopt (40 Cong. Rec. 9255). There was general agreement, both among supporters and opponents of the pipe line provision, as to what it was intended to accomplish, although Senator Tillman, who was in charge of the measure in the Senate, feared that the words used might have to be clarified by litigation (40 Cong. Rec. 7005, 7009, 9101–9103, 9105). See *supra*, note 3, p. 14. This Court, in the *Pipe Line* and *Valvoline* cases, has supplied that clarification.

B. *Appellant falls within the rule of the* Valvoline *case and not that of the* Uncle Sam *case.*—

[8] See also 40 Cong. Rec. 7001–7002.

Appellant relies chiefly (Br. 15–16) upon what this Court said with respect to the Uncle Sam Oil Company in *The Pipe Line Cases*, 234 U. S. 548, 561–562:

> There remains to be considered only the Uncle Sam Oil Company. This company has a refinery in Kansas and oil wells in Oklahoma, with a pipe line connecting the two which it has used for the sole purpose of conducting oil from its own wells to its own refinery. It would be a perversion of language, considering the sense in which it is used in the statute, to say that a man was engaged in the transportation of water whenever he pumped a pail of water from his well to his home. So as to oil. When, as in this case, a company is simply drawing oil from its own wells across a state line to its own refinery for its own use, and that is all, we do not regard it as falling within the description of the act, the transportation being merely an incident to use at the end. In that case the decree will be affirmed. In the others the decree will be reversed.

Discussing this passage, Mr. Justice Reed said in the *Valvoline* case, 308 U. S. 141, 146:

> The appellant relies upon the *Pipe Line Cases* to show that the present act does not cover a pipe line transporting oil for its own refining purposes only. The discussion referred to is that concerning the Uncle Sam Oil Company. But that com-

> pany's pipe line was used for the "sole purpose of conducting oil from its own wells to its own refinery." This was held not to be transportation under the Act. Here, however, it is the purchase from many sources and subsequent carriage that determine the applicability of the statute to Valvoline.

It is plain that appellant's operations do not fall within the terms of the exception described in the case of the Uncle Sam Oil Company. It will be noted that the situation covered by the exception exists only when a company is drawing oil from its own wells, to its own refinery, and for its own use. When these circumstances exist, this Court observed (234 U. S. at 562), the transportation will be regarded as "being merely an incident to use at the end."

None of these requirements is met by appellant. Its pipe line does not draw oil from its own wells or to its own refinery.[7] Nor does appellant transport petroleum products "for its own use." It transports them for sale to the public. The products it transports through its pipe line are not "for its own refining purposes only." Cf. *Valvoline* case, 308 U. S. 141, 146. Indeed, appellant transports products through its pipe line only "after preparation for market." Cf. *Valvoline*

[7] Plaintiff's pipe line is not a "crude oil" pipe line, extending from the wells to the refinery, but a "products" pipe line extending from the refinery to the pipe-line terminals.

case, 308 U. S. 141, 143. The shipments made by appellant were not for use in the refining process.* They were for sale on the market of a completed product.

In the *Uncle Sam* case the production, transportation, and consumption of the raw materials (crude oil) constituted successive stages in a single, uncompleted manufacturing process. There was no dealing with the public, either as buyer or seller. There was no transportation of a finished product. There was no sale to the public, in interstate commerce, of the commodity transported by pipe line.

Appellant's pipe line, on the other hand, transports finished products which are moving to market in the course of interstate trade and com-

* Cf. R. 948. The distinction between transportation for use in manufacturing and for sale to others was referred to during the debate in the Senate. Discussing the steel and pottery companies owning pipe lines bringing gas from their wells in another state "for the sole purpose of manufacturing in their own factories," Senator Bacon said (40 Cong. Rec. 7004–7005):

"I say that if the pipe line is exclusively the property of the manufactory using the gas, and if they only use the gas which they themselves produce in West Virginia, they can in no sense be called a common carrier. They are not serving the public in any particular. But if they are buying gas in West Virginia and transporting it to Pennsylvania and selling it to others, they are common carriers, and we have to frame the bill so as to meet all cases. If it is entirely a private enterprise, in which the production and the transportation and the use in manufacture are solely the act of one industry or enterprise, it does not fall under the provisions of this bill. It does not reach such a case at all."

merce. In the case of "contract" sales, the destination of the products is known prior to the interstate movement by pipe line (R. 409, 417). In the case of other sales, the petroleum products are shipped in response to a substantial and continuing demand, of such magnitude that at its peak it exceeds the capacity of the pipe line for contemporaneous delivery and requires the accumulation in storage of products shipped in advance and held in readiness to fill orders (R. 207–208, 210). Appellant's activities in selling and distributing petroleum products obviously constitute engaging in interstate commerce, for appellant sells and distributes products transported by the pipe line to purchasers located in States other than those in which its refinery and pipe-line terminals are situated (R. 206, 245). The interstate transportation of such products by pipe line for the purpose of distribution in such commerce must be regarded as a part of the through movement in interstate commerce beginning at the refinery and ending at the purchaser's place of business. Cf. *Walling* v. *Jacksonville Paper Co.*, 317 U. S. 564, 567–569. The transportation furnished by appellant's pipe line, therefore, is part of, or incident to, the sale and distribution of petroleum products in interstate commerce; and not, as in the *Uncle Sam* case, merely incident to the refining of the Uncle Sam Company's own oil, such "use at the end" of the pipe line not being commerce.

Additional light is shed on the meaning of the language used in the *Uncle Sam* case by reference to a similar passage in *Federal Club* v. *National League,* 259 U. S. 200, 208–209, where Mr. Justice Holmes, speaking for the Court, said:

> The business is giving exhibitions of base ball, which are purely state affairs. It is true that, in order to attain for these exhibitions the great popularity that they have achieved, competitions must be arranged between clubs from different cities and States. But the fact that in order to give the exhibitions the Leagues must induce free persons to cross state lines and must arrange and pay for their doing so is not enough to change the character of the business. According to the distinction insisted upon in *Hooper* v. *California,* 155 U. S. 648, 655, the transport is a mere incident, not the essential thing. That to which it is incident, the exhibition, although made for money would not be called trade or commerce in the commonly accepted use of those words.

In other words, if pipe-line transportation is incident to an activity which is not deemed to be commerce (such as manufacturing), then the physical transportation is not regarded as being subject to the Interstate Commerce Act. But on the other hand, it follows that if the pipe-line transportation is incident to an activity which is obviously interstate commerce (such as the marketing and sale of petroleum products among

the several States, in which appellant is admittedly engaged), then the transportation is subject to the pipe-line provisions of the Act.

Moreover, in the *Uncle Sam* case, the market price of oil was the same at Bartlesville and Cherryvale, the two termini of the Uncle Sam Oil Company's pipe line (R. 572, 684). Appellant's sale price at the product's destination, however, differs from its sale price at the Enid refinery. Indeed, the difference is meticulously computed and separately stated in billing the purchaser (R. 212, 219–220, 383). Since the product transported and sold by appellant is identical, insofar as its nature or processing is concerned, at both ends of the pipe line, this difference in value or market price at origin and at destination is attributable entirely to transportation, and is in fact calculated in terms of rail freight rates. It is idle for appellant, which furnishes part of such transportation, and collects a specific charge therefor, to contend that this amount paid by the purchaser is not a charge made for transportation and not one which operates to compensate it for transporting the product from Enid through the pipe line to the respective terminals. The fact that other competing oil companies employ the same system of pricing their products (R. 50) does not tend in any degree to show that appellant's charges do not represent compensation for transportation. Cf. Appellant's Br. 55.

With regard to appellant's method of selling and transporting its petroleum products, the Commission found that: "The differential, therefore, represents the charge assessed by the Champlin for transporting petroleum products through its pipe line from the refinery to the pipe line terminal" (R. 59), and that "Champlin is willing to sell its products to any part of the consuming public that can avail itself of the Champlin's facilities, provided the purchaser will agree to pay to the Champlin, under contract or spot sales, the so-called differential as compensation to the Champlin for transporting the product from Enid through the pipe line to the respective terminals," such differential being added to the Enid price of the product "in the sale of all products transported through the pipe line". (R. 66).*

Appellant cannot defeat the applicability of the regulatory statute by making sales f. o. b. purchaser's place of business or at the pipe-line terminal, instead of f. o. b. Enid refinery. The Interstate Commerce Act is not to be thwarted by technicalities with respect to the time and place where title passes. *The Pipe Line Cases*, 234 U. S. 548, 560; *Rearick* v. *Pennsylvania*, 203 U. S. 507, 512. Formalities regarding consummation of the sale cannot be utilized as the source of an advantage which appellant clearly could not en-

* This finding is supported by uncontradicted evidence of the most clear and convincing character. See R. 212, 215, 254, 255, 257, 262, and Exhibits 9 through 13 (R. 301–379).

joy if the same products, transported in the same manner, had in legal contemplation come into the ownership and possession of the purchaser at the Enid refinery prior to transportation through the pipe line. It was expressly held in *The Pipe Line Cases* (234 U. S. 548, 560), that the application of the Act could not be circumvented by the artifice of requiring that transfer of title take place prior to the commencement of transportation over the pipe line. Similarly it would seem clear that appellant should not be permitted to defeat the applicability of the Act by requiring that transfer of title take place only after the transportation by pipe line has been completed.

In *The Pipe Line Cases*, the companies involved "imposed as a condition to the carriage a sale to themselves" before the transportation commenced. This Court held that it would be "a sacrifice of fact to form" to exempt them on that account from compliance with the Act (234 U. S., at 560). The same would be true here if appellant were permitted to obtain exemption from the regulatory statute by the device of imposing, as a condition to the transportation by means of its pipe line, a sale to be consummated upon completion of the transportation.

In *Valvoline Oil Company* v. *United States*, 308 U. S. 141, this Court held that a company transporting, by pipe line to its refinery, crude oil which it had purchased from numerous producers and which it owned at the time of shipment,

was subject to the provisions of Section 19a of the Interstate Commerce Act. That decision is controlling in the case at bar. The only distinction between the two situations is that appellant is transporting petroleum products from its refinery to market for sale, instead of crude oil to its refinery after purchase. It is submitted that this distinction is productive of no difference in the legal result, and that in this case the result follows *a fortiori*, for a company transporting crude oil might much more plausibly assert that what it transported was simply raw material for its own use at its refinery than appellant could claim that finished products moving to the market were destined for its own use. The fact that the commodity transported is refined petroleum products instead of crude oil is, in itself, obviously immaterial. The statutory language is applicable to "oil or other commodity," with the exception (not pertinent here) of water and of natural or artificial gas.

It is equally clear that in appellant's operations, as in those of the Valvoline Company, the pipe-line transportation performed is an essential element in a course of business which involves dealing with the public. It would be artificial to draw a distinction because appellant is selling to the public, instead of purchasing from the public as Valvoline did. Purchasers to whom the pipeline company sells, as well as the sellers from

whom it buys, are entitled to the benefits afforded by the statutory provisions regulating transportation by pipe line.

C. *Appellant cannot enjoy the benefits but disclaim the burdens of common carrier status.*—We believe that the statute authorizes the entry of the order here involved for the reasons heretofore stated. If it be deemed relevant, however, it should be noted that appellant, as beneficiary of the exercise and enjoyment of some of the privileges of a common carrier in the common law sense, cannot properly complain if corresponding obligations are placed upon it. *Pierce Oil Corporation* v. *Phoenix Refining Company*, 259 U. S. 125, 128. Its corporate charter authorizes it to transport petroleum (R. 427), and in the construction of its pipe-line facilities the right of eminent domain was claimed and exercised.[10] While it may be technically true, as the Commission found (R. 60), that appellant itself has never exercised the power of eminent domain in connection with its pipe line, nevertheless appellant enjoyed the potential right to do so, and, moreover, through its *alter ego* and wholly-owned subsidiary, the Cimarron Valley Pipe Line Company, appellant facilitated construction of the pipe line by claiming the privileges of common carrier status.

[10] These circumstances were regarded as indicia of common carrier status in *Producers Transportation Co.* v. *Railroad Commission*, 251 U. S. 228, 231.

The line was built into and through Kansas under the authority of a certificate issued, on February 23, 1935, by the State Corporation Commission reciting that "public convenience will be promoted" by permitting appellant's instrumentality Cimarron to "transact the business of a common carrier" for the construction, maintenance, and operation of "a pipe line for the transportation of petroleum and its products." That certificate (R. 431) was issued after a hearing at which the secretary of appellant's subsidiary stated that, if construction were authorized, the line would file tariffs and submit itself to all the obligations of a common carrier (R. 268). Moreover, appellant's subsidiary instituted eminent domain proceedings in Kansas to condemn land needed to construct the pipe line (R. 200, 273–275). In each of such suits it claimed the status of "a corporation * * * with authority to transact business as a common carrier and to exercise the right of eminent domain in the States of Oklahoma and Kansas" (R. 274). These suits were later dismissed (R. 176, 200, 277–80); but the record does not disclose whether the owners of this land were ever notified that appellant's counsel had concluded that its subsidiary should relinquish and disclaim its common carrier status in Kansas. The fact that the property was acquired by settlement of the pending suits, rather than by consum-

mation of the eminent domain proceedings, is immaterial under "the rule, that settlement by an eminent domainer, with one whose property has been appropriated, is equivalent to the full and complete exercise of the power of eminent domain." *Pennsylvania Railroad* v. *Sagamore Coal Company*, 281 Pa. 233, 243.

Appellant's pipe line was continued into Iowa under a permit issued to appellant itself on March 15, 1940, by the Iowa State Commerce Commission authorizing the exercise of the right of eminent domain (R. 481–482). On October 7, 1941, appellant requested that this permit be amended, stating that it had not exercised the right of eminent domain and that it did not wish to be considered a common carrier (R. 483). The construction of the pipe line had been completed, however, before the permit was reissued on October 13, 1941 (R. 169, 191, 485); and the new Iowa permit also contained provisions authorizing appellant to use the property of other owners (R. 485). While no condemnation suits were brought in Iowa, it is a reasonable supposition that the authority to exercise the right of eminent domain in Iowa, which appellant enjoyed for over a year and a half, as well as the pending suits in Kansas, facilitated the purchase of the needed lands at prices favorable to appellant.

II

THE ORDER VIOLATED NO CONSTITUTIONAL RIGHT OF APPELLANT

Appellant has embarked upon a broad attack on the constitutional validity of the Interstate Commerce Act, claiming, among other things, that Congress may not subject it, a private carrier, to the obligations of a common carrier as the term is understood at common law (Br. 40–60). But the only order directed to appellant is one requiring information useful for purposes of valuation, and the validity of this type of order as well as its separability from other provisions of the Act was aptly put, with equal relevance here, in *Valvoline Oil Co.* v. *United States*, 308 U. S. 141. It was there said (*id.* at 146–147):

> Appellant presses its argument beyond the question whether it comes under the Act. If it does, it urges, the Act is in violation of the due process clause in that by the involuntary change of status from private to common carrier its property is taken. It looks upon the various regulatory provisions of the Interstate Commerce Act as inseparable from the valuation provisions of § 19a (a) and (e). The losses feared, from present or future legislation other than the valuation provisions, may never occur. The data required by the present order may never be used to fix rates. No such information as to other pipe lines has been so used. Publicity alone may give

> effective remedy to abuses, if any there be. This legislation was intended to free interstate commerce in oil from practices believed to be detrimental, and in that connection accessibility of valuation information to the Congress is essential. Its separate significance being apparent, we confine ourselves to § 19a (a) and (e). The constitutionality of such requirements was settled by the *Pipe Line Cases* and we see nothing that excepts appellant from their effect. The smallness of the operation is immaterial.

In any event, it cannot seriously be contended that the provisions of the Act are unconstitutional as applied to appellant. Appellant's pipe line was not constructed until after 1935 (R. 169, 191), long after the enactment of the original pipe-line provision in 1906 and its amendment in 1920. And in *The Pipe Line Cases*, 234 U. S. 548, 561, involving existing pipe lines, it was expressly stated that "So far as the statute contemplates future pipe lines and prescribes the conditions upon which they may be established there can be no doubt that it is valid." Had the Court, in *The Pipe Line Cases*, intended to refer only to "future" pipe lines which were, in substance, if not in form, common carriers in the common-law sense (Appellant's Br. 44–52), it is clear that this language would have been superfluous. Hence there can be no question as to the constitutionality of the Act as applied to appellant.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the decree of the district court should be affirmed.

J. HOWARD MCGRATH,
Solicitor General,

WENDELL BERGE,
Assistant Attorney General.

EDWARD DUMBAULD,
W. B. WATSON SNYDER,
Special Assistants to the Attorney General.

DANIEL W. KNOWLTON,
Chief Counsel,

NELSON THOMAS,
Attorney,
Interstate Commerce Commission.

NOVEMBER 1945.

APPENDIX.

The pertinent provisions of the Interstate Commerce Act, as amended, 49 U. S. C. 1, 19a, are as follows:

SEC. 1. (1) That the provisions of this part shall apply to common carriers engaged in—

(a) The transportation of passengers or property wholly by railroad, or partly by railroad and partly by water when both are used under a common control, management, or arrangement for a continuous carriage or shipment; or

(b) The transportation of oil or other commodity, except water and except natural or artificial gas, by pipe line, or partly by pipe line and partly by railroad or by water—from one State or Territory of the United States, or the District of Columbia, to any other State or Territory of the United States, or the District of Columbia, or from one place in a Territory to another place in the same Territory, or from any place in the United States through a foreign country to any other place in the United States, or from or to any place in the United States to or from a foreign country, but only insofar as such transportation takes place within the United States.

(2) The provisions of this part shall also apply to such transportation of passengers and property, but only in so far as such transportation takes place within the United States, but shall not apply—

(a) To the transportation of passengers or property, or to the receiving, delivering, storage, or handling of property, wholly within one State and not shipped to or from a foreign country from or to any place in the United States as aforesaid;

(b) or

(c) To the transportation of passengers or property by a carrier by water where such transportation would not be subject to the provisions of this part except for the fact that such carrier absorbs, out of its port-to-port water rates or out of its proportional through rates, any switching, terminal, lighterage, car rental, trackage, handling, or other charges by a rail carrier for services within the switching, drayage, lighterage, or corporate limits of a port terminal or district.

(3) (a) The term "common carrier" as used in this part shall include all pipe-line companies; express companies; sleeping-car companies; and all persons, natural or artificial, engaged in such transportation as aforesaid as common carriers for hire. Wherever the word "carrier" is used in this part it shall be held to mean "common carrier." The term "railroad" as used in this part shall include all bridges, car floats, lighters, and ferries used by or operated in connection with any railroad, and also all the road in use by any common carrier operating a railroad, whether owned or operated under a contract, agreement, or lease, and also all switches, spurs, tracks, terminals, and terminal facilities of every kind used or necessary in the transportation of the persons or property designated herein, including all freight depots, yards, and grounds, used or necessary in the transportation or delivery of any such property.

The term "transportation" as used in this part shall include locomotives, cars, and other vehicles, vessels, and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof, and all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported. The term "person" as used in this part includes an individual, firm, copartnership, corporation, company, association, or joint-stock association; and includes a trustee, receiver, assignee, or personal representative thereof.

* * * * *

SEC. 19a (a). That the Commission shall, as hereinafter provided, investigate, ascertain, and report the value of all the property owned or used by every common carrier subject to the provisions of this part, except any street, suburban, or interurban electric railway which is not operated as a part of a general steam railroad system of transportation; but the Commission may in its discretion investigate, ascertain, and report the value of the property owned or used by any such electric railway subject to the provisions of this part whenever in its judgment such action is desirable in the public interest. To enable the Commission to make such investigation and report, it is authorized to employ such experts and other assistants as may be necessary. The Commission may appoint examiners, who shall have power to administer oaths, examine witnesses, and take testimony. The Commission shall, subject to the exception

hereinbefore provided for in the case of electric railways, make an inventory which shall list the property of every common carrier subject to the provisions of this part in detail, and show the value thereof as hereinafter provided, and shall classify the physical property, as nearly as practicable, in conformity with the classification of expenditures for road and equipment, as prescribed by the Interstate Commerce Commission.

* * * * * *

(c) Except as herein otherwise provided, the Commission shall have power to prescribe the method of procedure to be followed in the conduct of the investigation, the form in which the results of the valuation shall be submitted, and the classification of the elements that constitute the ascertained value, and such investigation shall show the value of the property of every common carrier as a whole and separately the value of its property in each of the several States and Territories and the District of Columbia, classified and in detail as herein required.

(d) Such investigation shall be commenced within sixty days after approval of this part and shall be prosecuted with diligence and thoroughness, and the result thereof reported to Congress at the beginning of each regular session thereafter until completed.

(e) Every common carrier subject to the provisions of this part shall furnish to the Commission or its agents from time to time and as the Commission may require maps, profiles, contracts, reports of engineers, and any other documents, records, and papers.

State of Oklahoma, County of Tulsa—ss.

Harry O. Glasser of lawful age, being first duly sworn upon oath states, that he has prepared the foregoing motion and has personal knowledge of the matters therein stated, and that said motion is not filed for vexatious delay.

HARRY O. GLASSER.

Subscribed and sworn to this 9th day of October, 1945.

(Seal)

CONSTANCE TAYLOR,
Notary Public.

My Commission expires:
Oct. 29, 1945.

or copies of any or all of the same, in aid of such investigation and determination of the value of the property of said common carrier, and shall grant to all agents of the Commission free access to its right of way, its property, and its accounts, records, and memoranda whenever and wherever requested by any such duly authorized agent, and every common carrier is hereby directed and required to cooperate with and aid the Commission in the work of the valuation of its property in such further particulars and to such extent as the Commission may require and direct, and all rules and regulations made by the Commission for the purpose of administering the provisions of this section and section twenty of this part shall have the full force and effect of law. Unless otherwise ordered by the Commission, with the reasons therefor, the records and data of the Commission shall be open to the inspection and examination of the public.

* * * * *

(k) The provisions of this section shall apply to receivers of carriers and operating trustees. In case of failure or refusal on the part of any carrier, receiver, or trustee to comply with all the requirements of this section and in the manner prescribed by the Commission such carrier, receiver, or trustee shall forfeit to the United States the sum of five hundred dollars for each such offense and for each and every day of the continuance of such offense, such forfeitures to be recoverable in the same manner as other forfeitures provided for in section sixteen of this Act to regulate commerce.

(l) That the district courts of the United States shall have jurisdiction, upon the application of the Attorney General of the United States at the request of the Commission, alleging a failure to comply with or a violation of any of the provisions of this section by any common carrier, to issue a writ or writs of mandamus commanding such common carrier to comply with the provisions of this section.

U. S. GOVERNMENT PRINTING OFFICE: 1949

'46 Term, #21

Insert in Brief of United States.

October 24, 1946

Honorable Charles Elmore Cropley
Clerk, United States Supreme Court
Washington, D. C.

Re: No. 21, Champlin Refining Company
v. United States

Dear Mr. Cropley:

In response to requests made from the bench during argument in the above case, I submit the following references relative to matters which were not included in the Government's brief. Eight additional copies of this letter are enclosed and a copy has been sent to counsel for the appellant.

1. The legislative history of the phrase "or other commodity" in Section 1 (1) of the Interstate Commerce Act. - The Senate rejected by a vote of 22 to 33 a proposal by Senator Carter of Montana to strike out the words "or other commodity." 40 Cong. Rec. 6368-6370.

The legislative history shows also that several pipe lines for other commodities than crude oil were known to Congress at the time of passage of the Hepburn Act. Senator Long quoted a statement that several independent refining companies have built pipe lines for the transportation of their own "products" to market and that Standard Oil has expended many millions of dollars in the construction of pipe lines for the private transportation of crude "and refined" oil. 40 Cong. Rec. 9256.

The legislative history makes it clear also that not only will owners but the public at the other end of the pipe line were intended by Congress to be within the protection of the pipe line legislation. Not only will owners, but independent refiners as well, suffered from control of pipe lines by the powerful oil companies owning them. Senator Lodge referred to cases "where an independent refinery has been deprived of its supply of oil because it would not agree to the prices of the pipe lines." 40 Cong. Rec. 6366, R. 717. Senator Lodge also refers to many letters from independent refiners in support of the amendment. 40 Cong. Rec. 6365, R. 755.

2. The facts with reference to Cimarron. - The capitalization of Cimarron was only $350,000.00 (Original transcript on file with this Court, fol. 883), whereas according to Exhibit X (Champlin's own estimate of pipe line costs, as of December 31, 1940), the pipe line property cost $3,198,028.66 (R. 169-170, 49). The value of pipe line property in Iowa alone was $948,736.65 (Original transcript on file with this Court, fol. 977).

Champlin advanced to Cimarron the funds for construction of the pipe line involved in this case, and later cancelled the charges on its books (R. 177). Champlin used Cimarron as its instrumentality for constructing the pipe line in Kansas (R. 198-199).

Cimarron serves wells of others (R. 89, 167). Champlin produces only 10% of its own crude oil, so that 90% is purchased from others (R. 210).

In fairness it should be said that the figure of 10% was an estimate of the witness L. A. Snyder; and that in Exhibit No. 1320 before the Temporary National Economic Committee, a public document judicially noticeable, Champlin submitted the following statistics for the year 1938:

Crude oil produced	2,125,600 barrels
Purchased	2,671,256 "
Sold to others	1,381,657 "
Gathering lines moved	4,236,494 "
Proportion of crude oil transported for own use	60.61%

3. The Ueale Gas case in the legislative history of the Transportation Act of 1920. - Inquiry of the Interstate Commerce Commission and our own investigation reveals no evidence of any mention of the Ueale Gas case or the rule of that case in any of the recommendations made by the Commission to Congress with respect to the legislation which became the Transportation Act of 1920.

Sincerely yours,

J. Howard McGrath,
Solicitor General.